BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

ROSEMARY HOLTEGAARD
(Claimant)

PRECEDENT
BENEFIT DECISION
No. P-B-69
Case No. 69-4039

S.S.A. No.

DEPARTMENT OF HUMAN
RESOURCES DEVELOPMENT

The claimant appealed from that portion of Referee's Decision No. SJ-8763 which held that the claimant was ineligible for benefits for four weeks commencing April 6, 1969 under section 1253(c) of the Unemployment Insurance Code; that the claimant was disqualified for benefits under section 1257(a) of the code for a ten-week period commencing July 6, 1969 as provided in section 1260(d) of the code; and, that the claimant was overpaid benefits in the total amount of $196 for which she is liable under section 1375 of the code.

The Department of Human Resources Development appealed from that portion of the referee's decision which held that the claimant was not disqualified for benefits under section 1261 of the code.

The referee's decision held also that the claimant met the eligibility requirements of section 1253(c) of the code for the week beginning June 8, 1969 and cancelled the $49 overpayment for that week. Written argument has been submitted by the Department and the claimant.

STATEMENT OF FACTS

The claimant had 11 years' experience as an executive secretary. Effective January 12, 1969

she registered for work with the Department and established a benefit year for unemployment insurance benefits. After serving a waiting period week, the claimant claimed and received her full weekly unemployment benefits of $49 for each of 15 consecutive weeks through May 3, 1969.

The claimant was pregnant when she first established her claim. She entered the hospital at 10:20 p.m. on Thursday, April 10, 1969, and her baby was born about two hours later. The claimant remained in the hospital for a total of about 37 hours until she was released with her baby at 11 a.m. on Saturday, April 12, 1969.

When the claimant was released from the hospital, she asked her doctor if she could return to work right away. The doctor informed the claimant she could return to work but that he would not recommend it. At the hearing the claimant presented a statement from her doctor dated August 26, 1969 that she could have returned to work May 26, 1969. Despite her doctor's recommendation, the claimant felt able to work and went shopping for groceries on Saturday afternoon after her release from the hospital. The following week the claimant went to the Department on Monday to file her claim for benefits for the week ending April 5, 1969, and on Friday, her regular report day, to file her claim for benefits for the week ending April 12, 1969. She also looked for work that week and during subsequent weeks. When she filed her claims for benefits for the weeks ending April 12, 19, 26 and May 3, 1969, on each occasion she answered "yes" to the question on the claim form: "Were you physically able to work full time each regular work day that week" and she answered "no" to the question: "Was there any other reason you couldn't have worked full time each regular work day that week." At no time did the claimant inform the Department of her hospitalization and the birth of her child "because I don't think it occurred to me."

For reasons not in the record before us, the claimant did not claim unemployment benefits for five weeks from May 4 through June 7, 1969. On

June 11 she reopened her claim effective June 8, 1969, at which time she stated she had only one child under 16 years of age, which child was age eight (the child was actually then nine years old). The claimant testified she did not mention the baby because: "I guess I just never thought about it. She's so new I am still not used to the idea of having two children."

On June 20 and 27 and July 3 and 11, 1969, the claimant claimed and received full benefits of $49 for each of the immediately preceding weeks. On June 20 a representative of the Department questioned the claimant about her child care and then referred her to work with a prospective employer. The employer reported to the Department that because the claimant had a young baby she was offered part-time work; however, the claimant insisted that she wanted full-time work and that her 15-year-old sister could furnish adequate child care. Because of this report, the claimant was interviewed again about her child-care arrangements by one Department representative on July 3 and twice on July 11 by another representative and on at least these three occasions the claimant denied she had an infant child. The claimant testified she felt her fitness as a mother was being questioned and that it was no concern of the Department how many children she had so long as she had adequate child care.

After obtaining further information from the county recorder, the hospital, and school authorities, the Department determined the claimant was not able to work or available for work beginning April 6, 1969 through June 14, 1969 as she had not shown she had been released for work by her doctor and her 15-year-old sister had to attend school and could not provide full child care until after June 13, 1969. The Department assessed a $245 overpayment for the five weeks of benefits paid during this period.

At the hearing the claimant conceded that she had not been able to work or at least was not available for work each regular working day during the week ending April 12, 1969. However, despite her doctor's recommendation, the claimant insisted she was fully able to work beginning April 13, 1969. The referee made findings that the claimant was able to work beginning

April 13 but that her obligation to personally care for her infant was such that she could not be considered available for work through the week ending May 3, 1969. The referee further found that on and after May 9, 1969 the claimant's testimony that she had arranged for the care of her child with a licensed child-care specialist was clearly supported by cancelled checks dated May 16, 23, 29, June 6 and July 3, 1969. Therefore, the referee concluded the claimant was able to work and available for work during the week beginning June 8, 1969.

The referee also found that the claimant had wilfully failed to report a material fact when she did not inform the Department about her hospitalization. However, the referee concluded there should be no successive disqualifications for false statements or for the withholding of material facts because each subsequent misrepresentation related to the Department's position the claimant had inadequate child care when she actually had made adequate care arrangements which she refused to disclose because she felt her fitness as a mother was being questioned.

The questions before us for consideration are:

1. Was the claimant able to work and available for work as required by section 1253(c) of the code during the five weeks for which she claimed and received unemployment benefits between April 6 and June 14, 1969;

2. Should the claimant have been disqualified for benefits under section 1257(a) of the code and if so was an extension of the period of ineligibility under section 1261 of the code appropriate; and,

3. Was the claimant overpaid benefits and liable for the repayment of such benefits under section 1375 of the code?

REASONS FOR DECISION

Section 1253(c) of the Unemployment Insurance Code provides as follows:

"1253. An unemployed individual is eligible to receive unemployment compensation benefits with respect to any week only if the director finds that:

* * *

"(c) He was able to work and available for work for that week."

In reviewing appeals from decisions of referees, we have followed the spirit of the juridical principle that the findings of the trier of fact who heard the evidence and observed the witnesses in the tribunal below will be disturbed only if arbitrary or against the weight of the evidence. (Appeals Board Decision No. P-B-10) However, this board is not restricted by the substantial evidence rule, but rather is obligated by law to also make findings of fact and thus to reweigh the evidence in deciding whether the referee's findings are or are not against the weight of the evidence. (Appeals Board Decision No. P-T-13)

In the present case the claimant has conceded that she was not able to work or at least available for work each regular working day in her usual occupation as an executive secretary during the week beginning April 6, 1969 when she was hospitalized for the birth of her child. The claimant contends, however, that she was able to work immediately thereafter and the referee so found. The claimant certainly took some action consistent with this contention; she reported in person to the Department and sought work. Nevertheless, an immediate return to work would have been contrary to her doctor's recommendation at the time the claimant left the hospital on April 12, 1969. The claimant's inability to work was in effect subsequently confirmed by her doctor in his statement of August 26, 1969 that the claimant could have returned to work May 26, 1969. It is our opinion that the weight of the evidence supports a finding that the claimant, despite her aspirations, was not able to work as required by section 1253(c) of the code the week beginning April 6, 1969 and thereafter through the week ending May 3, 1969. In addition, the claimant's availability for work during such period is highly questionable, since the record supports the referee's conclusion that the

claimant did not establish that she had secured adequate child care prior to May 3. Therefore, she was overpaid benefits in the total amount of $196 for such weeks.

With respect to the week beginning June 8, 1969, we conclude, as did the referee, that the claimant was then able to work, having been released by her doctor, and established that she had adequate child care. Therefore, the claimant met the eligibility requirements of section 1253(c) of the code during that week and the $49 paid to her was not an overpayment of benefits.

Section 1257(a) and 1260(d) of the code provide in pertinent part as follows:

> "1257. An individual is also disqualified for unemployment compensation benefits if:
>
> "(a) He wilfully made a false statement or representation or wilfully failed to report a material fact to obtain any unemployment compensation benefits under this division."
>
> "1260(d). An individual disqualified under subdivision (a) of Section 1257, under a determination transmitted to him by the department, is ineligible to receive unemployment compensation benefits for the week in which the determination is mailed to or personally served upon him, or any subsequent week, for which he is first otherwise in all respects eligible for unemployment compensation benefits and for not more than nine subsequent weeks for which he is otherwise in all respects eligible for unemployment compensation benefits. . . ."

In the present case the claimant was hospitalized on a regular working day, she gave birth to a child which necessarily involved some change in child care arrangements in order for the claimant to work, and she had her doctor recommend that she not work. All of these facts were clearly material to whether the claimant should or should not obtain unemployment benefits. Even though the claimant may have felt

able to work immediately after her child was born, she was well aware that she could hardly be considered available for work while confined to a hospital. It was also not her prerogative to decide her own eligibility for benefits under the Unemployment Insurance Code but rather her obligation to report the facts to the Department as to her circumstances, particularly in answer to specific questions, and to permit the Department to perform its duty to determine the claimant's eligibility under existing law. The claimant's health and the number of her children and their ages, in view of the reaction of at least one prospective employer to the claimant's work application, were definite factors for consideration in referring the claimant to suitable employment as well as in deciding her ability to and availability for work.

Specifically, the claimant did not inform the Department of her hospitalization when she reported to file claims on Monday, April 14, 1969 (a late report) and on Friday, April 18, 1969. The claimant did not inform the Department of her doctor's recommendation that she not work when she claimed benefits for the weeks ending April 12, 19, 26 and May 3, 1969, in spite of specific questions on the claim form with respect to her ability to work and availability for work. On June 11, 1969 the claimant gave false information in reply to a question on how many children she had under age 16. On June 20, 1969, when she was interviewed about her child-care problems, the claimant did not reveal the extent of her problems. Even after these were brought to the attention of the Department by a prospective employer, the claimant in reply to specific questions on at least three occasions denied she had an infant child. From these facts we conclude that the claimant not only is subject to disqualification under section 1257(a) of the code for the ten-week maximum period set forth in section 1260(d) of the code, but that a consideration of the application of section 1261 of the code is indeed appropriate.

In Benefit Decision No. 6301, decided on June 17, 1955, we considered section 1261 of the code which then provided as follows:

"1261. When successive disqualifications under Sections 1256 or 1257 occur, the director may extend the period of ineligibility provided for in Section 1260 for an additional period not to exceed eight additional weeks." (Emphasis added)

The claimant in Benefit Decision No. 6301 on August 3 and September 2, 1953 filed claims for benefits in which he falsely stated he had had no work during the weeks ending August 2 and August 9, 1953, respectively. Subsequent to filing these claims, the claimant first registered for work and filed an additional claim for benefits on January 17, 1954. The Department determined the claimant was disqualified for benefits for five weeks beginning January 17, 1954, the maximum then provided by section 1260 of the code, and an additional eight weeks beginning February 21, 1954. We affirmed this determination, stating in part as follows:

"It appears plain that the legislature intended that, in the case of a claimant who disqualified himself on more than one occasion, he should be subject to an additional eight-week period of ineligibility if the department determined that the facts surrounding the disqualification warranted such a penalty. If this be true, it would appear that the legislature was primarily concerned with the question of repeated disqualifying actions on the part of the claimant; and it would therefore follow that the words "successive disqualifications" refer to the claimant's actions rather than to the disqualifying periods resulting therefrom. Applying this reasoning to the case at hand, we find that the "successive disqualifications under section . . . 1257" occurred when the claimant on August 3, 1953 made the misstatement concerning the week ended August 2, 1953 which was then followed by his misstatement on September 2, 1953 with respect to the week ending August 9, 1953. Consequently, the department did not act improperly in imposing the additional eight-week period of ineligibility."

In 1965, the legislature amended section 1261 of the code to delete the portions underlined above to refer only to disqualifications under section 1257 of the code and to eliminate reference to section 1256, so that section 1261 of the code now provides as follows:

> "1261. When successive disqualifications under Section 1257 occur, the director may extend the period of ineligibility provided for in Section 1260 for an additional period not to exceed eight additional weeks."

The fact that the legislature amended section 1261 of the code without changing the words "successive disqualifications" is indicative that our long-standing construction is in accord with legislative intent; otherwise the legislature would have used new or different language. (Crawford, The Construction of Statutes, 1940, section 224) Therefore, we reaffirm the position taken by this board in Benefit Decision No. 6301 that the words "successive disqualifications" as used in section 1261 of the code refer to the claimant's actions rather than to the disqualifying periods resulting therefrom.

In the present case, only one period of disqualification could be imposed under section 1260 of the code. However, because of the numerous disqualifying acts of the claimant under section 1257(a) of the code, we hold that section 1261 of the code permits the director of the Department to extend the period of ineligibility for one additional week or more weeks, up to and including eight weeks. We further hold that the facts and circumstances of this case justify the conclusion that the normal penalties are inadequate and that the director properly exercised his discretion in not only imposing an additional penalty but in imposing the maximum eight-week penalty provided in section 1261 of the code.

Section 1375 of the code provides as follows:

> "1375. Any person who is overpaid any amount as benefits under this part is liable for the amount overpaid unless:

"(a) The overpayment was not due to fraud, misrepresentation or wilful nondisclosure on the part of the recipient, and

"(b) The overpayment was received without fault on the part of the recipient, and its recovery would be against equity and good conscience."

Since the $196 total benefits paid for the four-week period beginning April 6, 1969 through May 3, 1969 arose as a result of the claimant's false statements or wilful nondisclosure, that overpayment cannot be waived under section 1375 of the code. As the $49 paid for the week beginning June 8, 1969 was properly received, that portion of the overpayment established by the Department is set aside.

DECISION

The decision of the referee is modified. The claimant did not meet the eligibility requirements of section 1253(c) of the code for four weeks commencing April 6, 1969 and was overpaid benefits for such weeks. The claimant met the requirements of section 1253(c) of the code during the week commencing June 8, 1969. The claimant is liable for an overpayment in the total amount of $196 and the $49 balance is set aside. The claimant is disqualified for benefits under section 1257(a) of the code for ten weeks as provided in section 1260 of the code and the period of ineligibility is extended for an additional eight weeks under section 1261 of the code.

Sacramento, California, March 5, 1970

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

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